

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In Re: : 06-22306
:
BAYOU GROUP, LLC., : One Bowling Green
: New York, New York
Debtors. : April 23, 2007
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TRANSCRIPT OF HEARING
BEFORE THE HONORABLE ADLAI S. HARDIN, JR.
UNITED STATES BANKRUPTCY JUDGE

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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SOUTHERN DISTRICT OF NEW YORK

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1 THE COURT: -- talk to each other about it --

2 MR. MENNITT: We will.

3 THE COURT: -- too, once it's circulated.

4 MR. MENNITT: We will, Your Honor.

5 MR. SCHWED: Thank you.

6 THE COURT: It should be circulated -- I guess I'd
7 like it if you can circulate it to the parties that have filed
8 objections here --

9 MR. MENNITT: We will.

10 THE COURT: -- and have an immediate dialogue on the
11 thing so that I don't have to deal with dueling counter
12 orders. I don't like that.

13 All right. Anything else on this?

14 MR. MENNITT: Not on this, Your Honor.

15 THE COURT: Thank you very much. What's next?

16 MR. MENNITT: The next item on the agenda, Your
17 Honor, is that the class action plaintiffs who have filed a
18 certain action before Judge McMahon have made a 2004
19 application --

20 THE COURT: Right.

21 MR. MENNITT: -- to the debtors for documents, and
22 basically, there are two types of documents, the documents
23 that the debtor -- the debtors' documents, and we have
24 produced those --

25 THE COURT: Uh-huh.

1 MR. MENNITT: -- to them and -- and then there are
2 documents that the debtors have obtained from the adversary
3 proceeding defendants and also from third parties; notably,
4 the investment advisors --

5 THE COURT: Let me articulate the problem so you
6 know whether I understand the problem or not. Some of the
7 documents that have been obtained in discovery by the debtors
8 here, the plaintiffs, have been obtained under a
9 confidentiality order, and those documents, some of them, have
10 been marked confidential or highly confidential or whatever it
11 is. And there is a provision of the confidentiality order
12 that says that in no event can the documents be used in any
13 but these proceedings. Is that basically --

14 MR. MENNITT: That is in a nutshell --

15 THE COURT: -- the bottom line?

16 MR. MENNITT: -- exactly what the bottom line is,
17 Your Honor.

18 THE COURT: And the concern is that although the
19 parties seeking the discovery, the class action plaintiffs,
20 have said we'll be bound by the confidentiality order, in
21 effect they can't be bound by the confidentiality order
22 because they have no function using the documents in these
23 adversary proceedings. The only possible purpose would be to
24 use them in the class action, and that's the nub of it right
25 there. Am I right?

1 MR. MENNITT: That's exactly correct, Your Honor.

2 THE COURT: Okay.

3 MR. MENNITT: It's not -- having said that, it's
4 really not the debtors' issue, obviously.

5 THE COURT: It's really not the debtors' issue,
6 exactly.

7 And you are?

8 MR. PFEIFFER: Your Honor, Mark Pfeiffer of Eckert
9 Seamans. I've filed a motion for pro hac vice admission of
10 behalf of the class plaintiffs. I don't know if the court has
11 signed it. Would you like me --

12 THE COURT: I don't either, but I'll grant it right
13 now. But you got to pay the \$25.

14 MR. PFEIFFER: I think I did, Your Honor.

15 THE COURT: All right. Granted.

16 MR. PFEIFFER: The debtor doesn't have significant
17 issues in the first class documents, to my understanding.
18 They're producing --

19 THE COURT: You mean the ones they produced?

20 MR. PFEIFFER: Or in the process of producing --

21 THE COURT: Right.

22 MR. PFEIFFER: -- for attorney eyes only. We're
23 talking to the debtor. We anticipate working out some sort of
24 arrangement or confidentiality agreement that would allow us
25 to use them for purposes other than attorney eyes. We would

1 like to for that --

2 THE COURT: But that's working it out with the
3 debtors, but they don't care. It's the defendants in your
4 class action that care, and really isn't this an issue for
5 Judge McMahon?

6 MR. PFEIFFER: No, Your Honor, I -- the issue as far
7 as the protective order and the scope of the protective order,
8 we've agreed to be bound by the protective order, meaning we
9 will -- we'll do everything to safeguard the confidentiality
10 of the documents. We will use them in the class action or
11 anticipate potential using them --

12 THE COURT: But that right there violates the
13 confidentiality order the way it's written, so what am I to do
14 about that?

15 MR. PFEIFFER: No, it doesn't violate --

16 THE COURT: Rock and a hard place.

17 MR. PFEIFFER: It doesn't violate the way the
18 confidentiality --

19 THE COURT: I'm going to stand up, if you don't
20 mind, because otherwise I get sort of frozen.

21 MR. PFEIFFER: I understand. It doesn't violate the
22 confidentiality order, Your Honor, because the prohibition on
23 using them for anything other than the adversary applies to
24 parties with a capital P. My client would not be a party with
25 a capital P. In fact, the -- or, the protective order

1 contemplates --

2 THE COURT: Can I interrupt you? It's a little too
3 technical for me.

4 MR. PFEIFFER: Okay.

5 THE COURT: Because you're right. You're not a
6 party, but that just exacerbates the problem, as far as the
7 defendants are concerned. So look, I guess my feeling -- you
8 know, you could conduct the same discovery against your
9 defendants and the defendants would perhaps be able to object
10 before Judge McMahon, but they -- they wouldn't have a leg to
11 stand on with regard to the confidentiality agreement because
12 they would not be breaching the confidentiality agreement
13 which exists only in this proceeding.

14 MR. PFEIFFER: From a practical --

15 THE COURT: So why don't you seek the same discovery
16 directly of the defendants?

17 MR. PFEIFFER: From a practical perspective, the
18 documents are in one place. They've all been reduced by --
19 or, reviewed by the lawyers, redacted, done whatever, taken
20 privilege -- privilege out of them, and delivered to --

21 THE COURT: And you have a time problem because --

22 MR. PFEIFFER: -- to the --

23 THE COURT: -- you've got a May 31 deadline, but of
24 course, Judge McMahon's order was dated February 15. So why
25 can't you go to Judge McMahon if you need to or serve the

1 defendants with exactly the same discovery that produced
2 whatever the plaintiffs are holding here and if they don't
3 produce it, go to Judge McMahon and say here's the problem,
4 Judge. That way we don't have what really is an artificial
5 problem in this bankruptcy, which really has nothing to do
6 with the class action.

7 MR. PFEIFFER: Your Honor, there's two parts to
8 this; there's defendants and non-defendants, and only one
9 defendant has objected, and a couple of their other non-
10 defendants have objected. A lot of the other people who
11 produced documents to the debtor haven't objected and this
12 would be in fact more burdensome on those people to now have
13 to produce to us the same documents that they produced to the
14 debtor. There's one simple repository, the debtor has them.

15 THE COURT: Wait a second. I get confused with
16 defendants. Start again but say -- identify who you're
17 talking about, what suit, the class action or these adversary
18 proceedings.

19 MR. PFEIFFER: Class action defendants. There's
20 only one class action defendant.

21 THE COURT: Uh-huh.

22 MR. PFEIFFER: That is the Hennessee group.

23 THE COURT: Yes.

24 MR. PFEIFFER: Okay. There are non-class action
25 defendants that have filed objections; four or five of them.

1 They may be an adversary defendant, they may not me.

2 Then there's another universe of people out there
3 who produced documents to the debtor and would then --

4 THE COURT: Oh, so some of your discovery would be
5 not of defendants -- of class action defendants, but would be
6 of third parties.

7 MR. PFEIFFER: Correct.

8 THE COURT: Okay.

9 MR. PFEIFFER: Third parties --

10 THE COURT: Well, you can do that, can't you, in the
11 class action suit?

12 MR. PFEIFFER: It would be difficult for the people
13 who have to respond a second time. The debtor has no problem
14 turning them over to us. They only perceive that there is a
15 technical problem with the confidentiality order. I -- I'm
16 posit to the Court that there is not a technical problem with
17 the confidentiality order. It, in fact, contemplates that
18 these documents could be produced to third parties for other
19 purposes.

20 THE COURT: It does? I thought not.

21 MR. PFEIFFER: Section --

22 MR. MENNITT: Yeah. What is that section?

23 MR. PFEIFFER: Section 8 of the confidentiality
24 agreement.

25 THE COURT: Okay, let's --

1 MR. MENNITT: It says --

2 THE COURT: -- let's hear it.

3 MR. MENNITT: -- both things, Your Honor. It says
4 that -- in paragraph 10, it says, "All discovery materials,
5 whether designated confidential or highly confidential or not
6 designated at all, shall be used by the parties solely for"
7 and then it lists a variety of uses which do not include class
8 action.

9 And then what's -- what is the -- what's the other
10 provision? It's --

11 MR. PFEIFFER: Paragraph 8. "Nothing in this order
12 shall restrict the right of any producing party or non-party -
13 -

14 THE COURT: Any producing party.

15 MR. PFEIFFER: "Any producing party or non-party
16 from seeking discovery of materials produced in connection
17 with actions other than the adversary proceedings herein,
18 whether by subpoena, document request, court order --

19 THE COURT: Right. That's what I'm suggesting.
20 Precisely.

21 MR. PFEIFFER: Or otherwise which is the 2004 exam.
22 These documents have already been produced to the debtor. For
23 a lot of the people, they haven't objected and it would be
24 more burdensome for them to actually have to produce it twice.
25 The debtor has no problem producing it but for this perceived

1 conflict in the -- the protective order which doesn't really
2 exist when you read --

3 THE COURT: Well, look --

4 MR. PFEIFFER: -- the protective order.

5 THE COURT: Look, if you seek -- you can do a couple
6 things here. You can seek a waiver of the confidentiality
7 order with respect to any party that has produced confidential
8 documents to the plaintiffs' counsel, and if they waive, then
9 there's not a problem, right?

10 MR. MENNITT: That's --

11 THE COURT: Mr. Mennitt?

12 MR. MENNITT: That's correct, Your Honor.

13 THE COURT: And if they don't waive, then you can
14 serve them with a subpoena in the civil -- in the class
15 action, and if it's objected to, then Judge McMahon can
16 resolve that. And I assume she will resolve it, unless the
17 discovery you seek is improper for some reason vis-a-vis the
18 class action, that she will grant the discovery, and then that
19 particular party that you have subpoenaed can either say all
20 right, but it would be a lot easier if you just get it from
21 the plaintiffs in the adversary proceedings and we'll give you
22 a waiver now.

23 MR. PFEIFFER: Your Honor, I'm not sure we know who
24 has produced documents; the entire universe of who has
25 produced documents to the debtor.

1 THE COURT: What have you asked for here then?

2 MR. PFEIFFER: Documents produced --

3 THE COURT: You just want all documents without even
4 knowing from whence they came?

5 MR. PFEIFFER: No, documents produced pursuant to
6 the protective order --

7 THE COURT: Irrespective of who produced them.

8 MR. PFEIFFER: Irrespective of who produced them,
9 and the thought is the protective order covers 2004 exams by
10 the debtor, subpoenas issued by the debtor, so on and so
11 forth.

12 THE COURT: Look, I think you can -- you -- there's
13 a better way to cover this. I'm not going to grant that 2004
14 motion. It's not that you can't have the documents. I'm sure
15 you can have the documents. But it seems to me that the
16 fortuity of these adversary proceedings really doesn't provide
17 an appropriate basis for invoking Rule 2004 for discovery that
18 is completely independent of the bankruptcy case, that has no
19 purpose of use in connection with the bankruptcy case --

20 MR. PFEIFFER: Well, it --

21 THE COURT: -- and is constrained by an order that
22 was the predicate for the production of the documents in the
23 bankruptcy case. And I'm not comfortable with proceeding this
24 way.

25 MR. PFEIFFER: We just addressed part B. Part A is

1 the debtors' own documents --

2 THE COURT: Uh-huh.

3 MR. PFEIFFER: -- which they're producing for eyes
4 only. We're going to, I think, talk to the debtor about
5 making them comfortable that they have a confidentiality
6 agreement in place. So that they don't have to review all the
7 documents that we're looking at, we're just going to tell them
8 which documents we want. They'll then review those documents
9 and maybe come up with a confidentiality --

10 THE COURT: If they will agree to produce documents,
11 fine.

12 MR. PFEIFFER: What we would request from the Court
13 is that we get some sort of placeholder hearing --

14 THE COURT: A what?

15 MR. PFEIFFER: A placeholder hearing so that if we
16 can't come to terms with the debtor in the next few weeks as
17 far as a protective order, a confidentiality agreement, that
18 we could come back before the Court and address this issue.

19 THE COURT: You can always come back before the
20 Court. I don't understand the point.

21 MR. MENNITT: Your Honor, we got -- we've produced
22 already everything that we produced to the -- of our own
23 documents, everything that we produced to the adversary
24 proceeding defendants, we have turned over to the plaintiffs'
25 class action attorneys. I can't imagine why we would not

1 cooperate with them voluntarily as long as we're not --

2 THE COURT: Sure.

3 MR. MENNITT: -- circumscribe by the protective
4 order --

5 THE COURT: Right.

6 MR. MENNITT: -- which we think precludes us from
7 doing that with respect to third party documents.

8 THE COURT: Right.

9 MR. PFEIFFER: Okay. I understood that they were
10 reluctant to allow us to use it for anything but for attorneys
11 eyes only absent a confidentiality agreement or protective
12 order.

13 MR. MENNITT: Well, if they want to -- and I don't
14 know what the status is on those negotiations, but if we come
15 up with an agreement, we'll certainly bring it to the Court.

16 THE COURT: All right.

17 MR. PFEIFFER: And if we can't come up with the
18 agreement, I'd like to be able to raise the spector again --

19 THE COURT: Sure, I'll be here, except when I'm not
20 here. And --

21 MR. PFEIFFER: Sometimes I'm not here either, Your
22 Honor.

23 THE COURT: I'm here most of the time, or I'd say
24 more in White Plains.

25 Anything else?

1 (No audible response.)

2 THE COURT: Okay. Well, I will deny the application
3 for Rule 2004. Would you do an appropriate order?

4 MR. MENNITT: Yes, Your Honor.

5 THE COURT: But it's without prejudice if you need
6 to come back for some reason. And again, I don't mean to be -
7 - to constrain your discovery. I really don't. It's just
8 that the discovery that has been obtained under the
9 confidentiality order was on that basis, and I'm not
10 comfortable with basically undermining that, especially when
11 you can get the same documents or whatever documents you want
12 from whatever parties you want in your own class action. And
13 if it happens that that's duplicative of what has been gotten
14 here and they don't want to produce it twice, they can waive -
15 - if you're given the right to that discovery and they don't
16 want to comply twice, they can waive the confidentiality.
17 Fair enough?

18 MR. PFEIFFER: Fair enough, Your Honor.

19 THE COURT: All right. Thanks very much.

20 MR. PFEIFFER: Thank you.

21 THE COURT: Anything else?

22 MR. MENNITT: Your Honor, the final item on the
23 agenda is an item that Mr. Klestadt will address.

24 THE COURT: All right.

25 Mr. Klestadt.